United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

Orig with affidavit of mlg

76-1160

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1160

UNITED STATES OF AMERICA,

Appellee,

—*against*—

JAMES W. FERRO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OR REHEARING *EN BANC*

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Eastern District of New York.

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PRELIMINARY STATEMENT

The United States by David G. Trager, United States Attorney for the Eastern District of New York, hereby petitions for rehearing, or in the alternative, rehearing en banc, of the judgment of a panel of this Court (Smith, Oakes, J.J.; Timbers, J. dissenting in part) entered on February 8, 1977, reversing a judgment of conviction entered in the Eastern District with directions that indictment 74 CR 322 be dismissed as to defendant James W. Ferro on the ground that Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C., App. ("Agreement") had not been complied with. The case was otherwise remanded to the district court for further proceedings relating to whether there had been compliance with the Eastern District Plan for the Prompt Disposition of Criminal cases. United States v. Cyphers, and Ferro, Dkt. Nos. 76-1131, 76-1160 Slip. op. 1737 (2d Cir., February 8, 1977).[1/]

1/ By motion, dated February 22, 1977, the United States requested an extension of time for the filing of this petition until March 24, 1977. In that motion, it was indicated that we would seek rehearing on the Prompt Disposition Plan issue. However, the United States has chosen to not press this issue and this petition is addressed solely to the dismissal, as to Ferro, of Indictment 74 CR 322 for violation of Article IV(e) of the Agreement.

STATEMENT

Appellant James Ferro appealed from a judgment of conviction entered on March 5, 1976 after a jury trial in the Eastern District (Platt. J.) on two indictments charging him with violations of 18 U.S.C. §1341 (mail fraud).

In his Brief on Appeal, filed on September 3, 1976, Ferro did not raise the alleged violation of Article IV(e) of the Agreement. It was first raised in a "Supplemental Brief", filed on September 30, 1976. Thereafter, the United States filed a Supplemental Brief, arguing that the Agreement did not apply to the United States as a receiving state, and that, in any event, the point had been waived under Rule 12 (f), Fed. R. Crim. Proc. Since United States v. Mauro, 544 F.2d 588 (2d Cir. 1976) petition for rehearing or rehearing en banc denied March 15, 1977, had been argued but not yet decided by this Court, either at the time of the filing of our Supplemental Brief (October 5, 1976) or at the time of oral argument (October 18, 1976) no retroactivity argument was or could have been made. On February 8, the panel by a 2-1 vote, reversed the judgment of conviction and ordered indictment 74 CR 322 to be dismissed with prejudice.

The facts relating to the issue pertaining to the Agreement are simple. On March 20, 1973, Ferro was arrested, following the issuance of a complaint charging him with mail fraud in violation of 18 U.S.C., §§1341, 1342 and 2. He was released and on July 19, 1973 surrendered to Ohio authorities to serve a State sentence. On October 12, 1973, pursuant to a writ of habeas corpus ad prosequendum, Ferro was brought to the Eastern District and entered a plea of not guilty to 73 CR 848. He was later returned to State custody and on November 12, 1973 a federal detainer was lodged with Ohio authorities. Ferro was returned to the Eastern District on February 5, 1974 on an ad prosequendum writ and thereafter moved, relying on United States v. Maze, 414 U.S. 395 (1974), to dismiss indictment 73 CR 848. Ferro remained in federal custody and on April 15, 1974, the United States moved to dismiss indictment 73 CR 848 and advised the district court that it would seek a superseding indictment. On April 23, 1974, a new indictment, 74 CR 322, was filed charging Ferro with two counts of mail fraud.[2/] On May 3, 1974, Ferro, who

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2/ Count 1 was derived from Count 20 of indictment 73 CR 848.

was still in federal custody, was arraigned on indictment 74 CR 322. Thereafter, Judge Travia, on June 26, 1974, endorsed the writ "to be returned from whence he came" and Ferro was returned to Ohio. He was released on parole by Ohio authorities on October 7, 1974 and turned over to the custody of United States marshals. Ultimately he was released on bail and stood trial on indictments 74 CR 322 and 75 CR 259[3/] (filed April 1, 1975) in the Eastern District on January 1976.

THE OPINIONS OF THE PANEL

The majority opinion by Judge Smith, in Part III, treated the claimed violation of Article IV(e). The majority rejected the Government's argument that "his failure to raise this claim prior to trial constituted a waiver under Rule 12 (f) of the Federal Rules of Criminal Procedure." (Slip. op. 1744). Finding "no showing that Ferro knew, prior to trial, that the detainer had been lodged against him," the majority held that "Ferro may invoke Article IV(e) for the first time on appeal to this Court," and citing United States v. Mauro,

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3/ Involving a separate transaction.

supra, ordered indictment 74 CR 322 to be dismissed with prejudice (Slip. op. 1745; emphasis added). Because indictment 75 CR 259, involving a separate transaction, had been filed after Ferro had been returned to state custody, the majority held that, as to this indictment, Article IV(e) had not been violated.

Judge Timbers dissented on the ground that "Ferro's failure to raise his claim under Article IV(e) of the Interstate Agreement on Detainers (the Agreement) until his supplemental brief on appeal - never in the district court - constitued a waiver under Fed. R. Crim. P. 12(f)" (Slip. op. 1749-50). Judge Timbers pointed out that "the orderly administration of criminal justice, in my view, requires that Rule 12 and the Agreement be accommodated." (Slip. op. 1750-51). According to the dissent, "Ferro clearly had knowledge of facts sufficient to put him on notice of the existence of the claim he waived under Rule 12(f)" (Ibid.).

REASONS FOR GRANTING THE PETITION

The decision in this case raises issues of vital importance to the federal criminal justice system. If the decision is permitted to stand the consequences will be intolerable.

Simply stated, it will result in the reversal of almost each and every case since the enactment of the Agreement in 1970 in which a sentenced State prisoner has been convicted in federal court by trustworthy evidence (or on pleas of guilty), contrary to the expectation of all the parties to the case: prosecution, defense, and district court.

It is the Government's position that the petition should be granted for the following reasons: (1) the Mauro decision, rendered October 26, 1976, should be held applicable only to cases in which the sentenced state prisoner had been returned to State custody without trial or disposition of the federal indictment after October 26, 1976[4/]; (2) the panel erred in its holding that there need be a knowing waiver of the Article IV(e) sanction, or in other words that the provisions of Rule 12(f) are inapplicable, a holding inconsistent with the almost simultaneous decision of another

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4/ This non-retroactivity arguement was not raised in our Supplemental Brief because, at the time, the Mauro decision had not yet been decided. At the time of oral argument, the decision had not yet been handed down. Therefore, we believe that it is not inappropriate, especially in light of the importance of this issue to the orderly administration of criminal justice, for us to now raise the retroactivity argument.

panel of this Court in United States v. Ford, Docket No. 76-1319, Slip op. 1681 (2d Cir. February 3, 1977); and (3) even if Mauro should be applied retroactively to this case, it should apply only to the indictment that was pending at the time Ferro was brought from Ohio, indictment 73 CR 848; not to indictment 74 CR 322, filed after he was brought to federal custody even though he was thereafter returned to State custody.[5/]

5/ Or at least not to Count 2 of this indictment which was not derived from the indictment upon which he was brought from State custody.

POINT I

UNITED STATES v. MAURO, APPLYING ARTICLE IV(e) OF THE INTERSTATE AGREEMENT ON DETAINERS SHOULD BE HELD APPLICABLE ONLY WHERE THE SENTENCED STATE PRISONER WAS RETURNED TO STATE CUSTODY AFTER OCTOBER 26, 1976, THE DATE OF THE MAURO CASE.6/

In United States v. Mauro, supra, the Court of Appeals, on October 26, 1976 for the first time in this Circuit (or any other Circuit), held that the provisions of the Interstate Agreement on Detainers, 18 U.S.C. App., are implicated when the United States obtains physical custody of a sentenced State prisoner, even though such prisoner is produced by means of a writ of habeas corpus ad prosequendum issued under 28 U.S.C. §2241(c)(5). It was the clear finding of Mauro that such writ is the equivalent of "the detainer provided for in the Agreement" (Id. at p. 594). Mauro expressly went on to hold that if such prisoner is returned to

6/ We continue to believe that United States v. Mauro, supra was incorrectly decided. However, in light of the denial of the petition for rehearing or rehearing en banc on March 15, 1977 we do not challenge Mauro on this petition. However, we have read the petition for rehearing with suggestion for rehearing en banc filed by the United States Attorney for the Southern District of New York in United States v. Ford, supra, in which it is argued that the Mauro decision is incorrect. We note that we join in that petition. Moreover, a nonretroactivity argument was made by the Southern District in its Ford, supra, petition. Their argument is consistent with ours, and we also join in their petition on this point.

State custody without having first been tried on the federal indictment, Article IV(e) of the Agreement requires that the federal indictment be dismissed with prejudice.

In concluding that the sanction of Article IV(e) applied to the United States, the majority opinion (per Mulligan, J.) recognized that the Agreement was designed to permit the "expeditious disposition of pending charges in another jurisdiction" (544 F.2d at 592). But in addition to this purpose, the Court stated that it was the Congressional "aim to eliminate the uncertainties which obstruct programs of prisoner treatment and rehabilitation" (Ibid.). In this regard, the Agreement was designed to prevent prosecutors from "shuttling" prisoners back and forth between their respective jurisdictions (Ibid.). Or, as recently explained in United States v. Ford, Docket No. 76-1319, Slip op. 1681 (2d Cir., February 3, 1977), the Agreement was expected to avoid the "disadvantages and potential abuses" of a system where "once one of the jurisdictions had tried and convicted him, the other jurisdictions, instead of trying him on their charges, would simply file detainers with the prison authorities

holding him." (Slip op. 1687-88). Prior to the Agreement, there was no way that a prisoner could clear the detainer and as a result he suffered serious consequences with regard to parole, rehabilitative programs and the like. This vice, according to Mauro, was not confined to situations where a traditional detainer had been used but also extended to where a State prisoner has been produced on a writ in federal court and returned (544 F.2d at 593).

Clearly, therefore, the Agreement proscribed certain longstanding prosecutorial practices and "provided prosecutors with a uniform set of rules governing temporary transfers for purposes of trial". United States v. Ford, supra at 1694. Indeed, in his dissent in this decision, Judge Timbers stated that "[t]he manifest purpose of Article IV(e) is deterrence" (Slip op. 1751; emphasis added). Accordingly, and in keeping with this scheme, Article IV(e) provides for the dismissal of an indictment (or information) with prejudice where the prisoner is returned to the original place of imprisonment prior to trial on the indictment. In effect, Congress has created a statutory exclusionary rule preventing further proceedings where Article IV(e) has been violated.

It is the exclusionary nature of the Article IV(e) sanction, a legislative-made prophylatic device

unrelated to the integrity of the factfinding process, now held applicable to the United States by Mauro, that warrants according only prospective application to the Mauro case.

While the question of determing retroactivity has been the subject of much effort by the Supreme Court, See, e.g., Annot. United States Supreme Court's Views as to Retroactive effect of Its own Decisions Announcing New Rules, 22 L.Ed. 2d 821 (1970), by the Courts of Appeals, e.g., United States ex rel. Angelet v. Fay, 333 F.2d 12 (2d Cir. 1964) (en banc), as well as of extensive scholarly comment, e.g., Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L.Rev. 1555 (1975), the Court has consistently given only prosective application to every case involving an exclusionary rule which was unrelated to the "integrity of the factfinding process". United States v. Peltier, 422 U.S. 531, 535 (1975). Therefore, it is our contention that the Mauro application of the Agreement's exclusionary rule, Article (IV)(e), should be similarly treated. Analysis of the Supreme Court's standards for

determing the retroactivity issue compel this result.[7/]

These standards, as stated in Desist v. United States, 394 U.S. 244, 249 (1969) quoting from Stovall v. Denno, 388 U.S. 293, 297 (1967), are as follows:

> "The criteria guiding resolution of the [retroactivity question] implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards."

This-three pronged test has been only recently applied and approved in United States v. Peltier, supra and United States v. Bowen, 422 U.S. 916 (1975). In Peltier, the Court held Almedia-Sanchez v. United States, 413 U.S. 266 (1973) (Proscribing "roving" Border Patrol searches) applicable only to

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7/ We contend that this argument of prospectivity is not undercut by the fact that in this case and in Ford, the Mauro decision was applied to cases pending on direct appeal, although the return of the prisoners occurred before October 26, 1976. In neither case was the retroactivity issue raised, either in the briefs or at oral argument. Moreover, in both cases the Government is petitioning for rehearing or rehearing en banc. Therefore, since each case was decided without treatment of retroactivity principles they should not be "interpreted as establishing any retroactivity limitation of general application". United States v. Peltier, 422 U.S. supra at 535, n. 5.

searches occurring after the date of the decision. Applying the Stovall standards, the majority opinion concluded that there is nothing in the exclusionary rule qua exclusionary rule that requires retroactive application. (Id. at 542.)

Turning to the three-pronged standards. Initially it is necessary to determine the purpose sought to be served by the Congressional exclusionary rule set forth in Article IV(e), now held applicable to the United States by the Mauro case. As set forth above, the rule was embodied in the Agreement in order to proscribe the prosecutional practice of "shuttling" prisoners back and forth between jurisdictions with resulting consequences to institutional rehabilative programs, parole plans, and "disruptive effect upon the prisoner's morale." United States v. Mauro, 544 F.2d supra at 593. Or, as cogently put by Judge Timbers in dissent here, "[i]t bespeaks a judgment that only the ultimate sanction of dismissal of the indictment will insure the government's compliance with the Agreement's purpose of securing the expeditions disposition of charges which require the lodging of detainers" (Slip op. 1751). Certainly, these purposes would not be advanced by retroactive application of Mauro.

The transfer in all such cases, whether pending direct review or collateral attack, "has already occurred and will not be corrected by releasing the prisoners involved" Desist v. United States, 394 U.S. supra at 249.

It is only when the purpose to be furthered by the exclusionary rule concerns "an aspect of a criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty in past trials", Williams v. United States, 401 U.S. 646, 653 (1972), that the new rule has been applied retroactively. The need to avoid or minimize arbitrary or unreliable results is paramount and the Court, in such instances, has rejected both "good faith reliance by state or federal authorities on prior constitutional law or accepted practice" and arguments concerning the "severe impact on the administration of justice". (Id.; emphasis added.)

We submit that the evident purpose of the Article IV(e) exclusionary rule is unrelated to the factfinding process. Certainly the Agreement was designed to expedite the disposition of outstanding charges in other jurisdictions in order to avoid speedy trial problems. Senate Report No. 91-1536, 91st Cong., 1970 U.S. Code Cong. & Admin. News, 4864; Smith v. Hooey, 393 U.S. 374 (1968). However, even if this right be construed to relate to the factfinding process, e.g. diminished witness recall, ARticle IV(e) may not be invoked to vindicate such right.

The appropriate provision in the Agreement is Article IV(c). See, United States v. Ford, supra. Since the rule, then, does not implicate the integrity of the judicial process, the criteria of reliance and impact must be examined.

We contend that there has been good faith reliance by the Government in utilizing the writ of habeas corpus ad prosequendum as independent and distinct from the detainer process provided for in the Agreement. Indeed, as far as we have been able to determine, in every case involving the production of State prisoners in federal court, in this district and elsewhere, it has been the consistent, regular and uniform practice of federal prosecutors to apply to the district court for such writs and upon the conclusion of the particular proceeding, to move for satisfaction of the writ and the return of the State prisoner "from whence he came". Indeed, on many occasions the district judge, absent a request by the prosecutor would sua sponte order the prisoner so returned. E.g., United States v. Mauro, 544 F.2d supra at 590. Upon return of the prisoner, the writ would be satisfied and there would be no "prejudicial consequences for the prisoner" United States v. Mauro, 544 F.2d supra, at pp. 596-97 (dissenting opinion per Mansfield, J.). Thereafter, the State prisoner would be again "writted" to federal

court for his next court appearance or for trial. Of course in a limited number of cases, for reasons of distance, or imminence of trial, or to accommodate a request by defense counsel for easy access to his client, or other particular reason, such a prisoner may have been kept in federal custody. But such retentions were clearly not the rule.

This reliance on the writ as not implicating the Agreement, and especially its sanctions was, in our opinion, justified and reasonable. It was universally so understood by the district court judges and defense counsel. We think that no other conclusion is possible. Indeed, it would have hardly been an "accepted practice", Williams v. United States, 401 U.S. supra at 653, if the law enforcement authorities had any inkling that their conduct did not conform to the prevailing "statutory...norm" United States v. Peltier, 422 U.S. supra at 542. Reinforcing this conclusion is the emphatic dissenting opinion of Judge Mansfield in Mauro and the statement of 12 of the 15 members of the original Senate Committee on the Judiciary which reported on the original bill recommending adoption of the Agreement.[8/]

8/ Set out in part in Judge Mansfield's dissenting opinion (544 F.2d at 574):

> The committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ

Accordingly, the reliance by the Government on the position that the writ of habeas corpus ad prosequendum was not a "detainer" under the Agreement with the corollary understanding that the Agreement was not involved was reasonable, and under the circumstances, justified.

The final factor concerns the effect on the administration of justice that retroactive application of the Mauro case would produce. Simply stated, such retroactive application would require reversal of almost each and every case in which a sentenced State prisoner has been convicted in federal court.[9/] Such a result is plainly unwarranted and would wreak havoc with the administration of justice and would yield a windfall benefit to those federal defendants who were, by ironic hindsight, fortunate enough to be serving a State sentence at the time of their federal proceedings.[10/] On the other hand, co-defendants who happened to be State prisoners who were not

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9/ In a limited number of cases, as stated above, the State prisoner may have been retained in federal custody. However, inquiry of the Administrative Office of United States Courts revealed that there are no relevant statistics from which we can even begin to estimate the number of cases involved.

10/ The Agreement by its express terms, is inapplicable to unsentenced State prisoners. Article III(a); see, United States v. Roberts, Docket No. 76-1670 (6th Cir., February 2, 1977).

sentenced at the time of their federal proceedings or federal prisoners would stand convicted following the very same trial. Such a result would be intolerable and unwarranted.

The Supreme Court in Gosa v. Mayden, 413 U.S. 665, 685 (1973), held O'Callahan v. Parker, 395 U.S. 258 (1969) to be prospective only, and recognized the impact on society of the retroactive application of a standard that was unrelated to the accuracy of a prior adjudication of guilt:

> Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses, particularly military ones, no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved.

Similarly, in Stovall v. Denno, supra, the Court stated that holding retroactive United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967),

would seriously disrupt the administration of the criminal laws. See also, Daniel v. Louisiana, 420 U.S. 31 (1975) denying retroactive effect to Taylor v. Louisiana, 419 U.S. 522 (1975) and DeStefano v. Woods, 392 U.S. 631 (1968) denying retroactive effect to Duncan v. Louisiana, 391 U.S. 145 (1968).

We contend that there is simply no justification to order the release of large numbers of federal prisoners who have been found guilty by trustworthy evidence (or on pleas of guilty). There has been general and proper, we submit, reliance on the separateness of the Agreement and the ad prosequendum writ, a construction now discredited by Mauro. However, since such decision was certainly not foreshowed, clearly or otherwise, we contend that it would be inequitable to apply that decision to any prisoner who was returned to state custody prior to October 26, 1976, the date of the decision.

In addition to our argument that the Mauro holding, applying Article IV(e) to the United States should be treated as a legislative-made exclusionary rule, we contend that since Mauro concerns a new (or for the

first time) statutory interpretation, retroactive application would not be proper. In Halliday v. United States, 394 U.S. 831 (1969), the Court held nonretroactive McCarthy v. United States, 394 U.S. 459 (1969) which construed Rule 11 of the Federal Rules of Criminal Procedure.[11/] In discussing the Halliday decision, the Seventh Circuit in a different context, stated that "[w]hile the standards for determining questions of retroactivity have been developed in the context of adjudication of constitutional questions, a decision based on statutory interpretation may be similarly limited". Bailey v. Holley, 530 F.2d 169, 173 (7th Cir. 1976) (emphasis added).

Thus, the fact that Mauro involved a question of statutory interpretation is not of particular moment.

11/ Of course in Halliday, the court stated that:

> In McCarthy we took care to note that our holding was based solely upon the application of Rule 11 and not upon constitutional grounds. Nevertheless, it is appropriate to analyze the question of that decision's retroactivity in terms of the same criteria we have employed to determine whether constitutionally grounded decisions that depart from precedent should be applied retroactively. See Linkletter v. Walker, 381 U.S. 618, 622-629 (1965). (394 U.S. supra at 832).

If anything, it should point to nonretroactivity since no fundamental or basic constitutional right is involved or sought to be protected. To hold c herwise would improperly penalize the Government which, as shown above, properly relied on the writ. Moreover, there is Supreme Court precedent for such an approach.

In Fuller v. Alaska, 393 U.S. 80 (1968), the Court declined to retroactively apply Lee v. Florida, 392 U.S. 378 (1968), which construed Section 605 of the Federal Communications Act, 47 U.S.C. §605, to be a legislative-made exclusionary rule. Relevant also, in this regard, is Allen v. State Board of Elections, 393 U.S. 544, 572 (1969) where the Court gave a broad reading to Section 5 of the 1965 Voting Rights Act, 42 U.S.C. §1973(c), but then gave purely prospective operation to the decision. See, Chevron Oil Co. v. Huson, 404 U.S. 97 (1972); Morrissey v. Brewer, 408 U.S. 471, 490 (1972) where the Court gave wholly prospective application to its holding regarding minimal due process requirements for parole revocations; and Hill v. Stone, __U.S.__, 95 S.Ct. 1637 (1975); cf., Lemon v. Kurtzman, 411 U.S. 192, 207-8 (1973)

where the Court held that reliance on legislation, later held unconstitutional, was justified, and the invalidating decision would not be held retroactive.

In sum, we contend that the Mauro decision should be given prospective effect only, that is, the holding should be applied only to cases in which the sentenced State prisoner was returned to State custody after October 26, 1976, the date of the decision. To hold otherwise in the absence of any unfairness in the trial, where there has been extensive good faith and justified reliance upon the "accepted practice" existing prior to the Mauro decision, where the impact on the administration of justice would to permit the release of large numbers of persons who, absent the fortituous circumstance of a state sentence, received a fair trial would be chaotic. We submit that it would be especially unfair to reverse a conviction because of non-compliance with requirements that no one (including the defendant) considered applicable to the Federal Government. Indeed, as Judge Medina aptly said in a related context:

> In the absence of any fundamental unfairness to the defendant, or doubt as to the reliability of the evidence admitted, it seems clear that the People of the State of New York have a definite and legitimate interest in seeing that the sentence imposed upon him is fully executed. (United States ex rel. Angelet v. Fay, 333 F.2d supra at 20).

Accordingly, we submit that Mauro should be held nonretroactive. To do otherwise would unwarrantly frustrate the ends of public justice.

POINT II

A WAIVER OF ARTICLE IV(e) OF THE INTERSTATE AGREEMENT ON DETAINERS NEED NOT BE A KNOWING WAIVER IN THE SENSE OF JOHNSON V. ZERBST.12/

Both the majority and minority opinions in this case agree that there may be a waiver of Article IV(e) of the Interstate Agreement on Detainers. The only dispute concerned whether, on the facts, there had been a waiver pursuant to Rule 12(f); or to put it another way, was the claimed waiver made knowingly. Moreover, in Ford, supra, another panel of this Court held that Article IV(e) was waived by the defendant's request to be returned to State custody. Thus, both Ford and this case are authority for the proposition that an Article IV(e) violation is not in the nature of a non-waivable infirmity, e.g., subject matter jurisdiction, but rather a defect that, if not asserted prior to trial is deemed waived.

Turning to what constitutes a waiver under Rule 12, we initially point out that the Supreme Court in Davis v. United States, 411 U.S. 233, 236 (1974), rejected the argument that the procedural waiver rules do not apply unless there has been a finding that a defendant has

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12/ 304 U.S. 458 (1938).

"'understandingly and knowingly' waived his claim" under the classic standard formulated in Johnson v. Zerbst, 304 U.S. 458 (1938). Indeed, Davis holds that Rule 12(f) does not require a traditional Johnson- type waiver. Davis v. United States, 411 U.S. supra at 236. We contend that the Davis standard is applicable here since the alleged defect concerning the Agreement hardly approaches, in either seriousness or magnitude, the defect alleged in Davis or in other cases which have applied the procedural waiver rule to constitutional violations, e.g., Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976); Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), or to statutory violations, cf. United States v. Gelb, 175 F.Supp. 267 (SDNY, 1959) (statute of limitations).

Quite plainly, a defendant can waive a basic constitutional right and such waiver need not be knowingly and deliberately made, see, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Indeed, as the Court stated in Schneckloth, "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial" (Id. at 237; emphasis supplied). Certainly,

the Article IV(e) sanction is anything but such a right. This is crucial for it is this nature of the guarantee that, according to the Schneckloth Court, warrants application of the "strict standard". (Id. at 238.) Moreover, Article IV(e) is also unrelated to the other trial rights specified in Schneckloth which require application of the Johnson criteria (Ibid.). See also, Estelle v. Williams supra and Francis v. Henderson, supra. In Estelle, the Supreme Court rejected an argument that these criteria, requiring a "knowing and intelligent waiver", apply to "the vast array of trial decision, strategic and tactical, which must be made before and during trial" (425 U.S. supra at 512; emphasis added).

Thus it is puzzling that the majority in this case declined to find that there had been a Rule 12(f) waiver because there had been "no showing that Ferro knew, prior to trial, that the detainer had been lodged against him." And this is especially so in view of Ford, decided five days earlier by a different panel of this Court, where a waiver was found based solely on Ford's request to be returned to State custody, absent any showing that he had any knowledge of the Article IV(e) "right". (Slip. op at 1698). The Ford majority stated:

> "In this case we need not decide whether the failure of a prisoner to express a preference as to the place of his incarceration pending trial, either through ignorance of his statutory right or otherwise, would nevertheless constitute a waiver of that right." (Slip. op. at 1698, n. 29).

Based on the facts of the Ford case, there is no doubt that that panel was not applying a Johnson v. Zerbst standard; otherwise, the Court could not have decided Ford as it did. This is made even more obvious by examination of the Mauro decision where that panel, in dictum, indicated that a waiver of the Article IV(e) right, to be effective, would have to meet the higher standard. United States v. Mauro, 544 F.2d supra at 591, n. 3. That this dictum, then, was rejected by Ford is implicit in its finding of waiver. Thus, Ford is clearly inconsistent with this case which requires that knowledge of the Article IV(e) right must be shown before there can be a Rule 12(1) waiver.

Since the Rule 12 waiver provisions do not require a Johnson type waiver to be established before they may be invoked, coupled with the holding in Ford that Rule 12 is applicable to Article IV(e), we contend that the failure of Ferro to timely assert his claim prior to trial, Rule 12(b), constituted a waiver of this claim, Rule 12(f), regardless of his actual knowledge of the nature of the right being

waived. Schneckloth v. Bustamonte, supra. To hold otherwise would be to elevate this non-guilt related nonconstitutional claim to a higher level than warranted, either by precedent or logic. Inasmuch as there has not been the required showing of cause to permit "relief from the waiver", Rule 12(f), Davis v. United States, supra, we submit that this claim was waived.

But, at the very least, there should be a remand to determine the state of Ferro's knowledge. There is simply nothing in the record to show whether he did or did not know sufficient facts to place him, as Judge Timbers stated in dissent, "on notice of the existence of the [Article IV(e)] claim. (Slip op. 1751).

POINT III

EVEN IF THE MAURO DECISION IS HELD RETROACTIVE, IT APPLIES ONLY TO COUNT 1 OF INDICTMENT 74 CR 322.

Ferro was first brought to the Eastern District of New York in October 1973 on a writ of habeas corpus ad prosequendum for arraignment on indictment 73 CR 848. Following arraignment, he was returned to State custody and thereafter, in February 1974, brought again to this District where he obtained dismissal of the indictment. While still in federal custody, however, a new two-count indictment, 74 CR 322, was filed and he was arraigned thereon. Count 1 of this indictment was derived from Count 20 of the indictment 73 CR 848; however Count 2 concerned a charge not in the earlier indictment. Following arraignment on the new indictment, Ferro was returned to State custody. He was thereafter tried on this indictment and another indictment, 75 CR 259, filed after his return to State custody.

We contend, even assuming that the Mauro decision is applied retroactively to this case, that Article IV(e) requires only that a sentenced State prisoner not be returned to State custody without having been tried on the indictment which was

the basis of the writ or detainer[13/] upon which he was produced in federal custody. Since Count 2 of indictment 74 CR 322 did not charge an offense contained in Indictment 73 CR 848, the untried indictment which was the basis of the writ, there has been no violation of Article IV(e) with respect to this count.

> By its express terms, the Agreement provides that:
> The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof....(Article IV(a)).

This cross-reference to Article V(a) is significant. It is Article V(a) that requires the sending State to yield temporary custody of the prisoner; the procedure being spelled out in Article IV(b), subparagraph (2) of which provides that the officer of the receiving State, upon demand, shall present:

> A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made. (emphasis added).

13/ United States v. Mauro, supra, 544 F.2d at 592, held that a writ of habeas corpus ad prosequendum is a detainer under the Agreement.

Clearly, th Agreement is triggered and pertains solely to formal charges, i.e., indictment, information or complaint, pending at the time that the prisoner is transferred from the custody of the sending State to that of the receiving State. Cf. Article III(a) and (d) (similar provision where the prisoner's demand initiates the transfer). Indeed, a prisoner produced under the Agreement may be prosecuted on the charges "which form the basis of the detainer... or ... on any other charges or charges arising out of the same transaction". (Article V(d)).

Article IV(e), which was held to have been violated in this case, provides:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. (emphasis added).

We submit that the term "hereby" is used to make plain that the untried "indictment, information, or complaint" means such formal charge "which formed the basis of the detainer" and not any other. Therefore, the Agreement, by its express terms, simply is inapplicable to an indictment which was not the basis for the detainer or which was not outstanding at the time of transfer.

This was of course, in effect, recognized by the Panel in this case inasmuch as it declined to order dismissal of indictment 75 CR 259 (Slip op. 1745). However, we contend that a similar result should obtain with respect to Count 2 of indictment 74 CR 322.

Accordingly, since Count 2 of indictment 74 CR 322 was not the basis of the detainer and was not pending at the time that Ferro was transferred to Federal custody, the sanctions of Article IV(e) do not apply. Hence, dismissal of the entire indictment was incorrect.

CONCLUSION

Rule 35 of the Federal Rule of Appellate procedure provides that petitions for rehearing en banc are not favored and that such rehearing "ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance". We respectfully submit that these standards have been met here.

The question of retroactivity of United States v. Mauro presents an issue of exceptional importance. The effects of a retroactive application of Mauro would be nothing short of catastrophic. There would be the unjustified wholesale release of practically every sentenced State prisoner convicted in Federal court since the enactment of the Agreement. Such a possibility alone warrants en banc consideration. Moreover, as we have shown, there is a conflict between the Ford case and this decision concerning the issue of whether the provisions of the Agreement can be waived absent a " knowing and intentional" waiver. To secure uniformity on this point, en banc consideration should be granted.

Accordingly, we respectfully submit that this petition for rehearing or in the alternative for rehearing en banc should

be granted and indictment 74 CR 323 not be ordered dismissed with prejudice.

Dated: Brooklyn, New York
March 18, 1977

Respectfully submitted,

DAVID G. TRAGER
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Eastern District of New York

BERNARD J. FRIED,
Assistant United States Attorney,
(Of Counsel)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Joanne Bracco being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 18th day of March 19 77 he served a copy of the within

PETITION FOR REHEARING OR REHEARING EN BANC

by placing the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 U.S. Courthouse
Foley Square
New York, N.Y. 10007

Thomas W. Evans, Esq.
20 Broad Street
New York, N.Y. 10005

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this
18th day of March 19 77

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618258
Qualified in Queens County
Term Expires March 30, 1977